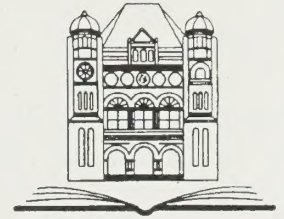


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# NOTES

## **SAME-SEX BENEFITS: DWYER AND SIMS V. MUNICIPALITY OF METROPOLITAN TORONTO**

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### INTRODUCTION

Increasingly, the courts are having to grapple with complex issues raised by *Charter* challenges to legislation that deals differently with opposite-sex and same-sex spouses. This has been particularly evident in the area of employee benefits. *Dwyer and Sims v. The Municipality of Metropolitan Toronto et al.*,<sup>1</sup> is the most recent in this developing line of cases. The decision has significant implications for municipalities and for private pension plans.

### THE ISSUES

Dwyer and Sims were employees of the Municipality of Metropolitan Toronto. Like all employees, they contributed to and were entitled to receive insured and uninsured benefits and were covered by the OMERS pension plan (Ontario Municipal Employees Retirement System). Unlike other employees, however, they were not entitled to have these benefits extended to their spouses. The governing legislation and terms of the plans limited entitlement to opposite-sex spouses of employees only. Dwyer and Sims sought, but were denied, extension of these spousal benefits to their same-sex spouses.

The resulting complaints to the Human Rights Commission focused on the opposite-sex definitions of "spouse" and "marital status" in the *Human Rights Code* and several other provincial statutes

including the *Municipal Act*, the *Pension Benefits Act*, the *Ontario Municipal Employees Retirement System Act*, and the provincial *Income Tax Act*. The complainants argued that these opposite-sex definitions and the resulting denial of same-sex spousal benefits violated both the *Human Rights Code* and the equality provisions of the *Charter of Human Rights and Freedoms*.

The respondents defended the opposite-sex definitions on the basis that the legislative objectives reflected by them and the means to implement them were reasonable and demonstrably justified in a free and democratic society (i.e., they are saved by s. 1 of the *Charter*).

### THE DECISION

The Board of Inquiry agreed with the complainants and concluded that the definitions of "spouse" and "marital status" in the *Code* and the other impugned provincial statutes violate the equality provisions of the *Charter* and are not demonstrably justified in a free and democratic society. The decision follows a previous Board of Inquiry decision in *Leshner v. Ontario*,<sup>2</sup> where the province was ordered to provide same-sex spousal benefits and to establish an off-side pension plan to provide comparable survivor benefits for its employees.

The Board found that the purpose of insured, uninsured and survivor spousal benefits was to

<sup>1</sup> Board of Inquiry (*Human Rights Code*), BI-0056-93, September 27, 1996, Tacon, S. (as yet unreported). The decision is under appeal.

<sup>2</sup> (1992), 16 C.H.R.R. D/184.

AZC-5419



provide for female spouses in traditional family units where the husband worked and the wife remained at home raising children. While this objective was of sufficient importance to override a constitutionally protected right, the means chosen to implement the objective (i.e., opposite-sex definitions) was not reasonable or justifiable. There was no rational connection between the objective and the means – benefits are equally available to husbands of female employees; benefits are not related to financial need or economic dependency; and impairment of the right to be free from discrimination was not minimal because same-sex spouses are totally excluded from receiving benefits, even if the relationships reflect economic dependency or financial need. The Board accepted the sociological evidence presented on the nature of same-sex spousal relationships:

In every definable respect – quality and duration of commitment, integration of personal lives, recognition by family, friends and the public as a couple, and so on – same sex partners develop the very same attributes of being a spouse as do heterosexual partners.<sup>3</sup>

The Board rejected suggestions that the opposite-sex definitions were tied to legislative objectives concerned with:

- ensuring an incremental approach to expanding protection against discrimination and extending benefits - there was no evidence that the legislation was part of a continuum whose eventual goal is to extend benefits to same-sex spouses;
- incurring additional costs and burdens of extending benefits - the evidence was that these costs would not be significant; or
- supporting couples with the capacity to procreate - the presence or absence of children is irrelevant to the entitlement to benefits.

In the Board's view, it is significant that insured and pension benefits are usually regarded as deferred "earned" wages and that participation in pension plans is often mandatory. These considerations distinguished the case from the two recent decisions

(*Egan and Rosenberg*)<sup>4</sup> which upheld opposite-sex spousal definitions in the *Old Age Security Act* and the federal *Income Tax Act* respectively. The Board noted that in *Egan*, the benefits sought were social benefits; here, the benefits were earned employee benefits.

## THE REMEDY

To remedy the infringement, the Board ordered that the spousal definitions in the various statutes "be read down" so as to eliminate the discriminatory effect of the words "of the opposite sex." The province was directed to apply the *Municipal Act* as if the definition of spouse included same-sex spouses and Metro Toronto was directed to provide insured and uninsured benefits to the same-sex spouses of its employees on the same basis as they are provided to the opposite-sex spouses.

The issue of spousal pension benefits was complicated by the risk of deregistration under the federal *Income Tax Act* (whose opposite-sex spousal definition was upheld in *Rosenberg*) and an attendant loss of tax advantages if OMERS were required to provide survivor benefits to same-sex spouses. The Board considered the cost of establishing an off-side pension scheme to be prohibitive. Instead, it ordered that the opposite-sex provisions of the PBA and the OMERS Act be similarly read down so that same-sex spouses are not excluded, but that this reading down is contingent on a similar change being made in the federal *Income Tax Act* through amendment or judicial decision. Once the federal Act permits benefits to be extended without deregistration, the impugned definitions in the provincial statutes are to be read in conformity with that Act.

<sup>3</sup> *Dwyer and Sims v. Municipality of Metropolitan Toronto*, p. 52.

<sup>4</sup> *Egan v. Canada* (1995), 124 D.L.R. (4th) 609 (SCC); and *Rosenberg v. Canada* (1995), 127 D.L.R. (4th) 738 (Ontario Court (General Division)). *Rosenberg* is currently under appeal.